

NEIL J. CUMMINS

IBLA 77-527

Decided November 3, 1977

Appeal from decision of the California State Office, Bureau of Land Management, canceling right-of-way for construction of water tank site, water pipeline, and access road.

Affirmed.

1. Rights-of-Way: Act of February 15, 1901--Rights-of-Way: Cancellation

A right-of-way issued pursuant to the Act of February 15, 1901, for the construction, maintenance, and operation of a water tank site, water pipeline, and access road is properly canceled where the permittee has not completed construction within 5 years from the date of the grant.

APPEARANCES: Neil J. Cummins, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Neil J. Cummins has appealed from a decision of the California State Office, dated July 18, 1977, which canceled a right-of-way granted him on August 4, 1966, pursuant to the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959 (1970), 1/ in sections 3 and 4, T. 22 S., 44 E., M.D.M., California.

The right-of-way authorized Cummins to construct, maintain and operate a water tank site, water pipeline and access road and provided that proof of construction was to be filed within 5 years of

1/ Repealed, Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2793. Rights-of-way are now governed by Title V of this Act. 43 U.S.C.A. (Supp.) § 1761 et seq. Existing regulations still govern rights-of-way "to the extent practicable." Id. § 1740.

the date of the grant. Upon determining that appellant had not complied with this condition, the State Office issued its decision canceling the grant. In his appeal, Cummins does not contest the authority of the Bureau of Land Management to cancel the right-of-way. However, he does ask that if it is canceled he be refunded a rental payment of \$250 he paid on August 6, 1976, for a 50-year term. This payment was made at the request of the State Office after the rental had been reviewed at the end of the second 5 years of the grant in accordance with the pertinent regulation 43 CFR 2802.1-7(e).

Turning first to the cancellation of the grant, we note that the State Office's decision states:

Section 2802.2-2 of Title 43, Code of Federal Regulations, allows a period of up to five years from the date of the right-of-way grant for completion of construction. A decision was issued March 16, 1976, allowing 30 days from receipt thereof in which to file the required proof of construction or, if construction had not been completed, to either relinquish the right-of-way or show cause why the right-of-way should not be cancelled. In response to this decision, the grantee reported by letter dated April 5, 1976, that there was no construction on the right-of-way and requested that it be continued for an additional five years because of the expectation of an upswing in the economy which would result in the development of the right-of-way.

A field report dated May 19, 1977, shows that the grantee has not constructed the authorized improvements. Appellant does not dispute this fact.

Section 2802.2-3, Title 43, Code of Federal Regulations, provides that rights-of-way are subject to cancellation for failure to construct within the period allowed. Therefore, pursuant to the last cited regulation, right-of-way R 06976 is cancelled in its entirety.

We find the State Office's discussion and conclusion proper.

There remains Cummins' request for a refund. As we have observed above, he made the request for the first time as part of his appeal. The propriety of the cancellation of the right-of-way is not dependent upon the payment of a refund and the cancellation stands whether or not one is allowed. Repayments may be made in certain circumstances. Federal Lands Policy and Management Act of 1976, 43 U.S.C.A. (Supp.) § 1734(c); 43 CFR 1822. The regulation provides that applications for repayment should be filed on a form approved by the Director with the authorized officer. 43 CFR

1822.2-1. It would be premature for the Board to consider the request for refund until Cummins has attempted to obtain one in accord with the proper procedure.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

